

1 UNITED STATES DISTRICT COURT
 2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
 3 (Asheville Division)

4 -----x
 5 UNITED STATES OF AMERICA, :
 6 Plaintiff, :
 7 :
 8 vs :
 9 :
 10 :Criminal Action:1-18-CR-86
 11 :
 12 FRANCISCO ESCAMILLA VILLA, :
 13 Petitioners. :
 14 -----x

15 VOLUME II OF II

16 Wednesday, December 4, 2018
 17 Asheville, North Carolina

18 The above-entitled action came on for a Motion to
 19 Suppress Evidentiary Hearing before the HONORABLE W.
 20 CARLETON METCALF, United States Magistrate Judge, in
 21 Courtroom 2, commencing at 1:02 p.m.

22 APPEARANCES:

23 On behalf of the Plaintiff:
 24 **DAVID A. THORNELOE, Esquire**
 25 Office of the U.S. Attorney - WDNC
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On behalf of the Defendant:
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 Official Court Reporter

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I N D E X

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1 P R O C E E D I N G S

2 THE COURT: Madam Court Reporter, I see the time.
3 Do you need to leave?

4 COURT REPORTER: Are you close to finish? If
5 you're close to finish I'll stay. But if you're not --

6 THE COURT: Let me say -- and I'm going to make
7 this real clear. We're going to finish the hearing until
8 it's finished. We're not going to cut it short. We're
9 going to make sure everybody has the time to do what they
10 need to do. So I don't know how long this is going to
11 take. There needs to be argument, of course, and I don't
12 know if the defendant is going to put on evidence.

13 Let me inquire of that now that the government has
14 concluded its evidence. Ms. Coleman.

15 MS. COLEMAN: I think I have one brief witness,
16 Your Honor, very brief.

17 THE COURT: All right. Madam Court Reporter.

18 COURT REPORTER: I have to go, yeah.

19 THE COURT: Okay. All right. Then let me do
20 this. For the record, we will proceed with the hearing
21 and with the evidence of the defendant. The court
22 reporter has indicated she must leave and, so, I will
23 allow that. But unless there's no -- unless there's an
24 objection from either party we'll proceed along and
25 continue to record using the court's audio recording

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1 capabilities.

2 Is that all right with you, Mr. Thorneloe?

3 MR. THORNELOE: It is, Your Honor.

4 THE COURT: And Ms. Coleman?

5 MS. COLEMAN: That's fine, Your Honor.

6 THE COURT: All right.

7 UNIDENTIFIED SPEAKER: (Inaudible.)

8 THE COURT: As long as someone is interpreting
9 fully and faithfully and accurately it's fine with me.

10 Okay, Ms. Coleman.

11 MS. COLEMAN: Your Honor, I'm going to call Jim
12 Allard and Mr. Mark (Inaudible).

13 THE COURT: All right. Mr. Allard, please come
14 around and be sworn.

15 (Witness duly sworn at 1:04 p.m.)

16 THE COURT: All right. Ms. Coleman, proceed.

17 **DIRECT EXAMINATION**

18 BY MS. COLEMAN:

19 Q. Could you please state your name for the record?
20 And spell your last name.

21 A. James Allard, A L L A R D.

22 Q. And, Mr. Allard, how are you currently employed?

23 A. I'm} an investigator with the Federal Public
24 Defenders' office in the Western District of North
25 Carolina.

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1 Q. How long have you been employed in that position?

2 A. 12 years.

3 Q. Mr. Allard, I'm just going to ask you a couple of
4 questions. Yesterday you were asked to investigate a
5 certain area along Highway 19; is that correct?

6 A. Yes, that's correct.

7 Q. And what, specifically, were you asked to do?

8 A. I was asked to look at where the traffic stop in
9 Mr. Villa's case took place, and the route from his
10 residence to where he was pulled over in Tipton.

11 Q. And that would be the route from -- I think the
12 address was 948 U.S. 19?

13 A. That's correct.

14 Q. Is that correct?

15 A. Yes.

16 Q. And then the address where he was pulled over,
17 that was 281 Tipton?

18 A. Tipton Road in Tipton, yes.

19 Q. Okay. And, Mr. Allard, in the course of your
20 investigation, were you able to discern what county each
21 of these addresses was actually in?

22 A. Yes, I was.

23 Q. What county is Mr. Villa's address, the -- sorry
24 -- the 948 Highway 19 in?

25

CROSS - ALLARD

1 A. That's in Macon County.

2 Q. Okay. And then what county was the address of
3 Topton Road.

4 THE COURT: Hang on one second. Go ahead, Madam
5 Court Reporter. We'll let you finish that.

6 Pardon me, Ms. Coleman. I just want to make sure
7 our recording is very clear here.

8 Okay. Why don't you restate your question again,
9 Ms. Coleman? Thank you.

10 BY MS. COLEMAN.

11 Q. What county is the 281 Topton Road address in?

12 A. That's in Cherokee County.

13 Q. And how were you able to discern that?

14 A. By a couple of ways. Graham County, Cherokee
15 County, and Macon County all converge where this bridge
16 crosses over from Highway 19.

17 Q. How do you know that?

18 A. Because I was there physically, and the signs were
19 there. I took pictures of the signs. And then the owner
20 of the address of 281 Topton Road, a Jessica Frost, was
21 at home, and I talked to her. I said, "Were you aware of
22 the traffic stop in your driveway?" And she was. And I
23 said, "What county do you live in?" And she said, "This
24 is Cherokee County."

25 Q. Okay. Did you approximate or estimate the

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1 distance between these two addresses?

2 A. Yes. It was almost 1.1 miles.

3 Q. Okay. That's all I have, Your Honor. Thank you.

4 THE COURT: Mr. Thorneloe.

5 MR. THORNELOE: Just briefly.

6 **CROSS-EXAMINATION**

7 BY MR. THORNELOE:

8 Q. Good afternoon, Mr. Allard.

9 A. Good afternoon.

10 Q. So you didn't go to a survey office or anything
11 like that to verify these facts that you just testified
12 to, did you?

13 A. No. In addition to talking to Ms. Frost, having
14 run an ACRO report on her address and it did come back as
15 Cherokee County, North Carolina.

16 Q. Okay. But you didn't make reference to maps or
17 surveys or GIS information or anything like that, did
18 you?

19 A. Just the byproduct of those: The signs that were
20 posted.

21 Q. I got you. Okay. Thank you, Mr. Allard.

22 THE COURT: Any redirect?

23 MS. COLEMAN: No, Your Honor.

24 THE COURT: All right. You may step down, sir.

25 (Witness excused at 1:08 p.m.)

1 THE COURT: Ms. Coleman, any further evidence by
2 the defendant?

3 MS. COLEMAN: No, Your Honor.

4 THE COURT: All right. Mr. Thorneloe, any
5 rebuttal evidence by the government?

6 MR. THORNELOE: No. No rebuttal evidence, Your
7 Honor.

8 THE COURT: All right. I will hear argument.
9 I'll give the government the chance to open and close the
10 argument.

11 MR. THORNELOE: Thank you, Your Honor. Your
12 Honor, I think the facts that have come out here today
13 are very much like what we expected them to be, so I just
14 want to highlight for you some way of looking at the
15 facts and the portions that matter. Essentially, we have
16 two issues for the Court to decide. One is whether or
17 not the defendant was in a custodial interrogation
18 with respect to his very statements, and whether or not
19 the consent to search that he gave of his home was
20 voluntary consent.

21 Let's just walk a little bit through the facts and
22 examine some of the statements. So, initially, the
23 defendant was stopped by the side of the road pursuant to
24 the traffic violation. There's every reason to think
25 that that traffic violation is valid; it was testified to

1 without contrary evidence. Even if it is a pretextual
2 stop there is nothing wrong with a pretextual stop. Case
3 law says that's fine.

4 Then, from there, we saw that the stop itself
5 probably lasted something less than 30 minutes.
6 Initially, the officers approached the vehicle and --
7 immediately before they even spoke with the defendant --
8 they noticed the odor of marijuana. And the defendant
9 made statements about marijuana, as well. The testimony
10 of the officers was also that the defendant essentially
11 gave consent to search his person for marijuana which
12 resulted in a vape pen, as you heard about, and cash.

13 What I'll tell you is ultimately not terribly
14 significant, what was found on the defendant's person,
15 but, from there, the traffic stop continued. And the
16 purpose of the traffic stop was lengthened because there
17 was a need to search the vehicle for marijuana. 1. The
18 officers may have interpreted the defendant's remarks to
19 mean he gave consent; and 2. The odor of marijuana
20 provides probable cause to search the vehicle for
21 marijuana and, so, that search is valid.

22 Then you see that Detective Stewart -- Task Force
23 Officer Stewart, he arrives on the scene and begins to
24 have a conversation with the defendant. The entirety of
25 his conversation occurs during the search of the vehicle.

1 THE COURT: Let me ask you a question about this.
2 Would you agree that there's a factual dispute as to
3 whether consent was given for the weapons' risk and the
4 personal search?

5 MR. THORNELOE: I think that there are no
6 evidence -- there's no evidence on the other side of
7 that. We have that one witness who testified -- let me
8 come back to that. My officer, Detective Breedlove,
9 testified that he got consent for that. There's an
10 affidavit that is on the other side of that which I
11 wasn't thinking of, but -- so that forms a factual
12 dispute. So we have one individual that gave live
13 testimony, was cross-examined; we have an affidavit on
14 the other side of that. So there is a dispute as to that
15 consent between those two documents and that witness.

16 And then, Your Honor, from there we have that
17 Detective Stewart had a conversation with the defendant,
18 and some statements were made during that conversation
19 that are important. The two that are the most important,
20 well, one relates to whether there's consent to search
21 back at the house, and the other is the defendant saying
22 that there are a couple of guns back at his house. And
23 it's really important for the Court to note that that
24 consent to search the house was complete before the
25 search of the vehicle because the traffic stop was not in

1 large or lengthened to have a further conversation with
2 the defendant.

3 All the conversation that matters with the
4 defendant was completed when that search of the vehicle
5 ended. So the only statements we are concerned with are
6 the ones that happened at the traffic stop are the ones
7 that happened during the search.

8 THE COURT: Am I correct that during a traffic
9 stop parallel lines of investigation can be opened as
10 long as it doesn't otherwise lengthen the traffic stop
11 unreasonably?

12 MR. THORNELOE: That's the government's position.
13 That if while the traffic stop is being reasonably
14 resolved, whether or not be a traffic matter or something
15 that naturally has arisen from the traffic stop from
16 which there is justification to do a search, such as the
17 search of a vehicle for marijuana, that that parallel
18 investigation can be pursued which is essentially what
19 we're saying happened and which developed into voluntary
20 consent to search back at the house.

21 We would submit to the Court this is the type of
22 consent that is really unusual because it wasn't brought
23 up by the defendant. Now the defendant disputes that in
24 his affidavit, but Detective Stewart's testimony is that
25 while he asked a question about whether there were drugs

1 in the house he never asked, can I go to your house and
2 search?

3 THE COURT: Let me back up before I forget a
4 couple of things I wanted to ask you. There's been no
5 testimony about audio recordings; correct?

6 MR. THORNELOE: Correct, Your Honor.

7 THE COURT: There's been no testimony about video
8 recordings so we don't have any of that type of evidence.

9 MR. THORNELOE: We don't have any of that type of
10 evidence.

11 THE COURT: With respect to any factual disputes
12 that may exist. Would you agree that those disputes are
13 for the Court to determine based on the credibility of
14 the witnesses and the weight of the evidence?

15 MR. THORNELOE: I agree, Your Honor.

16 THE COURT: Okay.

17 THE COURT: Because in this case, when we get to
18 the house, we're talking -- there is a consent form, and
19 it's Government's Exhibit 1, and it's been admitted
20 without objection. There is no question that there is a
21 consent form that's signed.

22 MR. THORNELOE: There is no dispute as to that.

23 THE COURT: Now the defendant is going to say --
24 has said and has argued in briefing that that -- that
25 there is a question as to the voluntariness of that

1 consent and whether that's a legitimate consent. But
2 there's at least no dispute that there is a form there.
3 That's not the case with respect to the alleged consent
4 for a weapons frisk and the personal search. You agree
5 with that.

6 MR. THORNELOE: I think that's right, Your Honor.

7 THE COURT: Okay. So the defendant was stopped
8 initially and -- as I heard the evidence, it appeared
9 that the justification -- the only justification was
10 based on the traffic violations. Is that -- would you
11 agree with that?

12 MR. THORNELOE: There may be some distinction
13 between pure traffic violation, such as speeding and
14 moving across the center line, and driving without a
15 license. I still think that -- they're all traffic
16 related, but those are the three reasons.

17 THE COURT: Fair enough. Fair enough. So
18 crossing the center line, exceeding the posted speed
19 limit, and driving without a license. If we cull that
20 the bucket traffic-related offenses, that was what
21 created the reasonable suspicion to support the stop in
22 the first place.

23 MR. THORNELOE: Yes, Your Honor.

24 THE COURT: Okay. There was no reasonable
25 suspicion with respect to drug issues or the prior

1 investigations or anything like that.

2 MR. THORNELOE: No, Your Honor, that's not our
3 basis.

4 THE COURT: Okay. All right. Go ahead.

5 MR. THORNELOE: So, Your Honor, it's important to
6 note that the consent to search and the voluntary -- the
7 statement concerning weapons at the home were attained
8 prior to the end of the search of the vehicle. From
9 there we have this volunteering of consent to search the
10 house which is unusual. And our version of the facts for
11 Detective Stewart is that the defendant volunteered that.
12 The defendant was asked, hey, do you really want us to
13 come search your house? And he agreed to do it and
14 accepted a ride to the house and, then, from there, they
15 traveled to the house a very short distance. Clearly,
16 it's about a mile. One mile or 1.1, whatever it was.
17 And the defendant rode in the back of one of the police
18 vehicles. There's no evidence that he even knew that
19 those doors were locked, just that that's where he rode,
20 and he was there for probably a little more than a
21 minute.

22 THE COURT: Let me ask you about this invitation
23 to search. So as I was listening to Detective Stewart's
24 testimony I was trying to listen very closely and take
25 notes. And what I thought I heard him say initially was

1 that when he was talking to the defendant, while the
2 search of the vehicle was taking place, that they had a
3 conversation and he said something to the effect of, are
4 there any weapons or anything -- any guns or drugs --
5 actually drugs, I guess, in the vehicle? No, there's
6 not. I don't have any in the vehicle.

7 Do you have anything in your vehicle either? No,
8 I don't have anything there. You-all can go check if you
9 want to. That's the invitation, I think, that you're
10 talking about. But a little bit later, when nothing else
11 was found in the car, I thought I heard him testify that
12 as the search was concluding he said something to the
13 defendant to the effect of, if you're okay with it we'll
14 go search your house.

15 First of all, tell me if I'm wrong with regard to
16 how I heard his testimony. And then I'm going to ask you
17 as to whether that makes a difference.

18 MR. THORNELOE: Your Honor, I honestly can't
19 remember the specific wording of that followup comment,
20 the "if you're okay" comment. I don't doubt what you
21 heard. I just don't remember that -- the wording of that
22 comment, and I didn't make a note of it. What I do
23 recall is the initial "you can go check," the invitation
24 volunteering to come see the house, and Detective Stewart
25 testifying that they confirmed with the defendant: Do

1 you really want to do this? Are you really offering
2 consent?

3 He had really two opportunities at the roadside to
4 change his mind about that and, then, from there they
5 indeed went to the house. We know that prior to
6 searching the house and prior to doing -- asking any
7 further questions they went through that consent to
8 search form and that that was at 7: 29. And I'll note
9 that 7 o'clock to 7:29 is a really short period of time
10 and is not an unreasonably lengthy period of time that
11 would cut towards custodial interrogation with regards to
12 the roadside stop, especially when } you have a reason to
13 extend the stop which was the odor of marijuana. So we
14 have that time hack, if you will, of 7:29.

15 And then if we think of -- I think we should parse
16 the conversations somewhat that have happened in this
17 case. We could think of the conversation that happened
18 back on the roadside as "Conversation 1." And, then, I
19 think if you were to analyze the conversations it might
20 be appropriate to separately evaluate each one and decide
21 whether or not they amount to a custodial interrogation.
22 And it may be appropriate that the roadside conversations
23 have one set of analysis and that later conversations
24 have a different set of analysis. With that said, there
25 were no questions asked prior to the form being signed at

1 the house. And then, from there, you have a very
2 intermittent conversation with the defendant from,
3 basically, 7:30 till probably 8:30.

4 THE COURT: Is that "Conversation 2," in your
5 analysis?

6 MR. THORNELOE: I'd call that "Conversation 2,"
7 Your Honor, yes. During the search of the house you have
8 occasional questions about things in the house such as,
9 where is your bedroom? How do I get to the safe? That
10 kind of thing. So during that period of time you could
11 -- I think the circumstances about whatever was asked and
12 answered during that period are pretty much the same.
13 Nothing really changes from a legal perspective, I don't
14 think, during that time. You've got law enforcement who
15 are inside the house at that point. And the defendant in
16 this case he is -- he's already been told he's not under
17 arrest.

18 And let me just mention that in this case the
19 phrase "you're not under arrest," I would submit to you,
20 is even more important than usual. The case law says
21 that phrase is not talismanic, or however you say that,
22 but it is a factor in favor of the government. It
23 doesn't say it's not.

24 THE COURT: It's a factor; it's not dispositive
25 though.

1 MR. THORNELOE: It's not a dispositive factor,
2 that's right, Your Honor. But in this case I would
3 suggest to you it's more powerful than usual. Because at
4 the roadside the likely arrestable offenses are
5 marijuana. That's what we're searching the car for.
6 That's what everybody smells. We've asked about that,
7 and the words in evidence, and drug trafficking, and
8 those issues, haven't come up at all, and the defendant's
9 -- any comments about guns and that the defendant didn't
10 know that that was an offense, and it wasn't raised as an
11 offense.

12 The only offense that was on the table, really, at
13 that point, was marijuana possession. And the officer
14 dispelled the idea that he was going to arrest him
15 pertaining to that particular offense: "You're not under
16 arrest; I'm not going to arrest you for marijuana" is
17 what was said, which -- so, in this case, that's even
18 more powerful than "you're not under arrest." Because if
19 the defendant -- say the example is -- there's a lot of
20 child pornography cases in these instances, and the
21 defendant is sitting on a mountain of child pornography,
22 and he says you're not under arrest. It's kind of hard
23 to believe that all this child pornography before us may
24 not be a reason to arrest. It's at least a little harder
25 in this case, an offense like marijuana possession, which

1 is a misdemeanor minimal possession amount. So it's even
2 more believable that you're not under arrest for that
3 reason. So I would say that is particularly important in
4 this case.

5 But moving back to the residence. Your Honor,
6 what is the defendant's custody status at that point?
7 He's certainly not restrained, physically speaking. He's
8 been in the back of the patrol car very briefly, which he
9 consented to. He's not handcuffed. His personal
10 property is reachable to him with -- I agree with the
11 exception of the vape pen and the cash that was taken
12 from him. But his cell phone, his wallet, his keys, are
13 not locked away somewhere. And he's with a detective,
14 Lieutenant Willis, but, really, nothing is going on
15 between the two of them. He's not being restricted in
16 his movements particularly, at least, not in a way that's
17 expressed to him.

18 So what the officers subjected internal beliefs
19 about what restrictions they placed on him really don't
20 matter that much. It's what someone in his position
21 objectively feel about his custody status. Then we have
22 calm tones. The defendant is calm. The agents are calm.
23 The numbers of officers there is seven. That's how many
24 there are. That's not really a disputed fact in this
25 case.

1 THE COURT: And that's a lot for a traffic stop.

2 MR. THORNELOE: Well maybe it depends, Your
3 Honor, on the way they interact with the defendant. How
4 many are actually talking to him, how are they acting,
5 and what sort of compulsion and coercion are they
6 applying upon him?

7 THE COURT: So the number of agents, in your mind,
8 does not cut in favor of the defendant?

9 MR. THORNELOE: I would say it's probably a
10 neutral factor if you consider the entire 90 minutes at
11 the traffic stop. That's probably more than we usually
12 see at a traffic stop. At the residence, that's not more
13 than you would see at a search of the home. That's
14 actually fewer than you see. In a lot of the case law
15 you see 20 to 30 agents sometimes at -- and a search
16 warrant being conducted. So perhaps at the traffic stop
17 that's a little more than usual. But if you narrow it
18 down and say, how would they impact the defendant in this
19 case? Well they were pretty cool cucumbers there. They
20 were not coercing and compelling the defendant on the
21 scene there. What you got was the way -- I would submit
22 the way detective Stewart acted which is he's very
23 conversational he's very calm he's very engaging in a --
24 just a ordinary everyday way lath rather than being
25 interrogation technique.

1 THE COURT: Let me go back to this invitation
2 issue. Lawyers in the civil bar really like to discuss
3 the difference between consenting to a motion and not
4 objecting to a motion. Now that may not be a good
5 analogy for this case, I don't know, but is there a
6 distinction here between a defendant who invites law
7 enforcement to come to his home and search as opposed to
8 a defendant who consents to a request from law
9 enforcement to search?

10 MR. THORNELOE: I think there is, Your Honor.
11 And there may even be a third category of, sort of,
12 compliance with, you know, someone kicking your door in
13 and you don't fight the cops. That doesn't mean you
14 consented to it. Clearly, we're not there. I would say
15 that, as I said previously, I think we have sort of
16 consent plus the fact that the defendant brought this up
17 demonstrates that it is a particularly cooperative
18 defendant, a defendant who's not nervous about this, and
19 feels like he has nothing to hide and is not coerced into
20 giving that consent whatsoever.

21 THE COURT: Let me ask you hypothetically. If the
22 Court were to find that the invitation -- that there were
23 not an invitation made -- an invitation was not made by
24 the defendant, what does that do to the government's
25 position?

1 MR. THORNELOE: Your Honor, I think you still
2 have consent. I mean at least you have consent. The
3 case law says that written consent is better proof of
4 consent than lack of written consent. I've never had a
5 case with an invitation, and I didn't even find much case
6 law about that. There's no reason to think that it's a
7 good factor for the defendant.

8 THE COURT: But that's what is being urged by the
9 government here, isn't it? That the defendant not just
10 consented to have law enforcement come to his house,
11 where he knew there were weapons, but that he invited
12 them to come there. That's the position, if I understand
13 it.

14 MR. THORNELOE: Right. And, why, you might be
15 wondering. I offer, as a theory -- and here is my theory
16 of why he offered that. He knew he didn't have any
17 drugs, and he didn't think that weapons were an offense,
18 and he could offer for the officers to come that day and
19 they would see everything is fine here and end the
20 investigation, and the heat was off. I'm not saying that
21 that's been testified to or that's in his affidavit or
22 anything Detective Stewart heard that fits the facts
23 though.

24 So, Your Honor, I do say that there was an
25 invitation, and there is -- you can infer a reason that

1 there is an invitation because the defendant didn't think
2 he had anything he needed to hide; he just didn't know he
3 did.

4 THE COURT: He knew he had firearms but he was not
5 concerned about that. He knew he does not have any
6 narcotics so he has nothing to hide. That's the theory
7 you're talking about?

8 MR. THORNELOE: That's right.

9 THE COURT: Okay.

10 MR. THORNELOE: That's right. And that fits our
11 facts. So, Your Honor, if we're talking about --

12 THE COURT: I expect we may be about to hear a
13 different theory from the defendant.

14 MR. THORNELOE: I am sure (inaudible). But, Your
15 Honor, with respect to -- let's go back to talking about
16 the conversations at the house which is what I refer to
17 as "conversation 2." So while the search is ongoing you
18 can look at that conversation that happened, which is
19 incriminating to the defendant. He knows where the guns
20 are. He knew they were in the safe. He showed them the
21 safe where the guns were located. He knows where the
22 guns are. He can get into the safe where the guns are
23 located and things like that. It shows he had some
24 control or ownership over the firearms, and he pretty
25 well acknowledges, hey, these are mine.

1 Then, at the end of the search, you have a third
2 conversation. The defendant still hasn't been accused of
3 anything in particular, and the tone of the conversation
4 is the same as it has been all along. Detective Stewart
5 asks him some questions about, "What's up with the
6 guns?," is basically the way he phrased it. Why all
7 these guns? He says, well, I'm a mechanic, you know, and
8 I buy and trade them sometimes. That suggests to me
9 maybe he gets them as compensation for his mechanics
10 business. But he also says, yeah, there's some folks
11 around here that concern me, and I have them for
12 protection.

13 So those statements at the very end are
14 incriminating as well. You maybe could consider them as
15 "Conversation 3" if you want to break these out. At that
16 point all the evidence is before him. Still, the
17 defendant doesn't know in particular that possessing
18 those firearms is an offense. And, really, even that
19 entire conversation is barely told to him that, hey,
20 because of your immigration status you're not supposed to
21 have these firearms. Ultimately, the reason he's
22 arrested is marijuana and marijuana paraphernalia, and
23 he's taken away and not charged federally until later.

24 So, Your Honor, that's the, I think, big picture
25 of the conversations. You have two issues to resolve.

1 You have custodial interrogation, and you have the
2 consent to search of the house, and that's the way I see
3 things. I'll just save any further comments in response
4 to Ms. Coleman.

5 THE COURT: Let me ask you one more question
6 before you sit down, if I may. If, just hypothetically
7 speaking, the Court finds that there was no invitation,
8 and if the Court also finds that there was not voluntary
9 consent to search the residence, would there nonetheless
10 be probable cause for that search and, if so, why?

11 MR. THORNELOE: There's probably probable cause
12 to go search the residence for guns. The problem is we
13 haven't -- I'm not standing here saying that that would
14 save the government's case, though, because we haven't
15 identified an exigent circumstance they would need to go
16 run in there with probable cause without a warrant.
17 That's his residence. That's where his Fourth Amendment
18 protections are probably at their highest. So, with that
19 piece of information, could the government have gotten a
20 search warrant? Probably so. Because the defendant said
21 he didn't have any legal status. I own firearms and
22 they're in my house. So I'm saying we could have gotten
23 a search warrant at that point. That was probable cause.
24 That's not sufficient probable cause or circumstances to
25 go into his house absent consent without a warrant.

1 THE COURT: I see. Okay. Thank you, sir.

2 MR. THORNELOE: Thank you.

3 THE COURT: Ms. Coleman.

4 MS. COLEMAN: Your Honor, I'll start with what
5 the government just stated which is Fourth Amendment
6 protections are highest in your home, and that's why we
7 would have argued absolutely they could not have entered
8 Mr. Villa's home without a warrant. Even if they had
9 probable cause for the statements in regards to the guns,
10 get a warrant. You can't immediately enter his home.

11 I'm going to take this a little bit out of order
12 just to address what's, sort of, first and foremost on
13 our mind which is the invitation. And, of course, our
14 position is there was no invitation of Mr. Villa to
15 enter his home. There was no consent. The legal phrase,
16 or the terminology we're looking for, is "begrudging
17 submission," and there's case law on it, and we cited it.
18 I believe it's *Roberts* and also *Bowman*. *Bowman* is a case
19 out of this court where there was a very similar
20 statement made by a state trooper, as the judge was very
21 keen to pick up on. It is very similar to the statement
22 which I wrote verbatim during the testimony today which
23 was: "If you're okay, we're going down to your house and
24 take a look around." That is not a question. That is
25 not a, "Can we go to your house?" That is not an

1 explanation of what we're going to do when we get there.
2 That is a, "We're going down to take a look at your
3 house. Okay?" And, if anything, at most what happened
4 next was a "begrudging submission" on the part of
5 Mr. Villa to then go along to the house.

6 THE COURT: Isn't there some distinction in degree
7 between the statement in *Bowman* and this statement you're
8 talking about? The statement in *Bowman* was made by a
9 trooper to the defendant, Mr. Bowman, who was seated in
10 the trooper's patrol vehicle. And I think his statement
11 was to the effect of, "Hang tight. I'm going to go talk
12 to the passenger in your car, Mr. Alvarez." Am I
13 remembering the case correctly?

14 MS. COLEMAN: That is correct, Your Honor.

15 THE COURT: Isn't that -- that is the statement in
16 *Bowman*, more direct, severe, and in the nature of an
17 order more so than the statement that we heard today.

18 MS. COLEMAN: I don't think in the totality of
19 the circumstances, no. Because what you have here -- as
20 opposed to the *Bowman* case which is one trooper -- is you
21 have a theme that is a police dominated atmosphere.
22 There are so many police officers dominating this scene
23 that when a statement was made it means something to
24 Mr. Villa. It means we're going to do this. Okay?
25 And then he has no other option other than to comply.

1 And that's what, you know, voluntariness is all about.
2 Is there another option? Did you voluntarily allow this
3 search?

4 So I think the other major theme is this is such a
5 police dominated atmosphere. The government doesn't give
6 much weight to the number of police officers, but we
7 would argue it should be shown great weight. This all
8 begins -- it's a pretextual stop. We know that because
9 it was a prior investigation. But this all begins on a
10 traffic stop for a very minor traffic infraction of
11 speeding, touching the center line, the most severe of
12 which is an allegation of driving without a license.

13 However, almost immediately upon the scene we get
14 seven police officers and four vehicles. And the
15 testimony of Officer Breedlove is that every single one
16 of them was wearing some type of identification as an
17 officer, body armor, and wearing sidearms. That is the
18 immediate situation to which Mr. Villa exits the car.
19 And we do argue that the patdown of his person was not
20 consensual. One thing that is missing from any of the
21 testimony that we've heard today was any testimony in
22 regard to firearms, or believing that Mr. Villa may be
23 armed, or that he's dangerous. It's actually the
24 opposite and that he's very collegial.

25 THE COURT: Let me back you up and go through this

1 sequentially then. You heard the government's position
2 that the defendant was stopped upon reasonable suspicion
3 on the basis of the traffic violations, the speeding, the
4 going across the center line and lack of what I'll call a
5 lack of a driver's license. If we can call those the
6 traffic violations, that's the position of the government
7 as I've heard it.

8 Don't you agree that that alone creates a
9 reasonable suspicion for the stop in the first place?

10 MS. COLEMAN: I do. I do also believe there is a
11 question on jurisdiction which wasn't fully answered as
12 to whether or not a local Macon County police officer can
13 pull Mr. Villa over in Cherokee County for traffic
14 infractions that aren't felonies. I do think that there
15 is an argument to be made there about did they have
16 jurisdiction to stop him to begin with? If they do, then
17 it is reasonable suspicion to pull Mr. Villa over and I
18 can concede that if those traffic infractions were in
19 fact observed to and committed.

20 THE COURT: And he has not, I don't believe,
21 denied speeding, driving left of center, or driving
22 without a license. Am I correct about that?

23 MS. COLEMAN: We -- I think that the Court can
24 consider the credibility of the speeding and whether or
25 not an officer can estimate in that short period of time,

1 but we have no evidence to the contrary.

2 THE COURT: Right. He's put an affidavit in the
3 file in this case, and he didn't explicitly deny that. I
4 don't think did he.

5 MS. COLEMAN: He did not, Your Honor.

6 THE COURT: Okay. Now what do you say about the
7 government's position that a parallel investigation,
8 essentially, was developed during the course of the stop,
9 and that investigation was essentially begun before the
10 traffic stop concluded?

11 MS. COLEMAN: I do believe that a -- I think when
12 you're looking at -- I guess this goes to the question of
13 whether or not he was in custody for the purposes of the
14 statements he made. It's the *Miranda* issue. And I think
15 the argument that we make is that even though there is,
16 maybe, a parallel investigation going on, you still have
17 to consider the police dominated atmosphere. There are
18 two cases that we cited in our reply, *Hashime* and
19 *Colonna*, which basically find that even though the
20 defendant was there, he's told he's not under arrest.

21 Once you look at the large number of officers,
22 sort of, the isolation of the defendant, the loss of
23 control of the vehicle, the personal possessions. Even
24 though there is a parallel investigation it's our
25 argument he is in custody at that point. He is at least

1 detained for the purposes of a custodial interrogation
2 from the time that Officer Stewart begins asking him very
3 specific questions that are unrelated to the traffic
4 stop.

5 And that's another point that's I'd like to make
6 in this parallel investigation. There are questions
7 being asked that are not related to the traffic stop, not
8 to the marijuana vape pen, not to the traffic violations.
9 When you're asking, are there drugs at your residence?
10 Are there guns at your residence? That is exceeding the
11 scope of anything that's been uncovered during the
12 investigation of a personal use marijuana vape pen.

13 So we do believe that officers should have
14 mirandized Mr. Villa before they started asking these
15 questions and that these questions exceeded the scope of
16 the traffic stop to begin with.

17 THE COURT: Let me ask you about the weapons
18 frisk. The defendant has argued that the weapons frisk
19 was improper. There's been a position taken by the
20 government, I believe, that it was consensual. I know
21 there's a distinction or a dispute, rather, about that
22 issue, but was there -- even if we assume that he did not
23 consent to the frisk, wasn't there at least one or more
24 bases for the frisk to take place properly?

25 MS. COLEMAN: The only bases I could perceive

1 would be that certainly there is no basis to pat him down
2 for weapons. There is no testimony at all that he was
3 dangerous. The only, I think, perceived patdown would be
4 related to the smell of marijuana coming from the
5 vehicle. I don't believe that we received specific
6 testimony in regard to Mr. Villa's consent. Officer
7 Breedlove couldn't even remember if he was the one who
8 patted him down or not. So I don't think that we can
9 credit his testimony in regard to whether or not
10 Mr. Villa consented. He also could not explain what
11 specifically was asked of Mr. Villa and if it was
12 explained to Mr. Villa what a "patdown" was. Even given
13 that, officers -- even, could they pat him down for
14 potential marijuana?

15 I do think there is a problem with the money.
16 Money doesn't feel like drugs, money doesn't feel like a
17 gun, and that's what Terry is. Is there a weapon readily
18 apparent? And this is part of the issue with Mr. Villa
19 being custodially detained is that they take the money.
20 The money's not connected to a personal use misdemeanor
21 vape pen or a traffic stop. And the money is never given
22 back to Mr. Villa. So this all goes to the totality of
23 the circumstances where he's told he's free to leave but
24 he doesn't have his personal possessions.

25 THE COURT: But the detection of the odor of

1 marijuana. Does that not give rise to probable cause to
2 search both the car and the person of the defendant? Not
3 just a reasonable suspicion but probable cause to search.
4 Or am I wrong about that?

5 MS. COLEMAN: It does the vehicle. They did not
6 -- I don't think that they specifically stated whether or
7 not they smelled, in the testimony today, marijuana on
8 Mr. Villa's person or in the vehicle. I think the smell
9 of marijuana gave them probable cause to search the
10 vehicle, but there was no contraband found in the
11 vehicle.

12 THE COURT: I think the testimony was they smelled
13 both emanating from the vehicle and, perhaps, from the
14 defendant as well. We can check the record to confirm
15 that. But, if that were in fact the case, would you
16 agree that that would also, then, give them probable
17 cause to search his person?

18 MS. COLEMAN: For marijuana, Your Honor, yes.

19 THE COURT: Okay. All right. Go ahead.

20 MS. COLEMAN: Once we get -- so our argument is
21 that Mr. Villa was detained. Any statements that he
22 made at the side of the traffic stop were made in
23 violation of his *Miranda* rights. It's those statements
24 that led to the purported invitation to come back to his
25 house, and then moving from the scene of the initial stop

1 and back to his house.

2 First, we'll note that it does not appear anyone
3 ever told Mr. Villa specifically that he was free to
4 leave. And the purposes of the traffic stop were
5 concluded but not in a normal manner. Like, there were
6 no citations given to Mr. Villa. Mr. Villa wasn't
7 told, okay, you're free to go. Instead, what happens
8 next is the begrudging, well, let's take you back to your
9 home. And there's testimony that, oh. Well he was free
10 to go; he could have gone any time.

11 But what we're looking at is, what would a
12 reasonable person think when his possessions are still
13 being held by the police? They have his \$3,000 in their
14 car, they have locked up his car at that scene and told
15 him he can't drive. And it's under those circumstances
16 that they're also saying, oh. Sure, we'll give you a
17 ride. And I think there's a question in regard to, is it
18 a ride home or is it a ride to search your house?

19 And I do also think that there's weight given to
20 this argument that it's a police dominated atmosphere.
21 And if there's four cars on the scene, and the car that
22 Mr. Villa is placed in is the one that's the actual
23 police car whose doors can't open from the inside, and
24 that's the vehicle he's transported in. So if you're
25 looking from the perspective of, what would a reasonable

1 person think? A reasonable person would think I'm in
2 custody. I'm in the back of a police car and I don't
3 have the right to tell them I want to go. I want to go.
4 No one is going to do that with four cars and seven
5 officers.

6 And then that sort of atmosphere continues. Once
7 you get back to the house he's let out of the car but
8 he's never told, hey. You're free to leave. He's
9 brought a consent form. It's not read to him in English
10 or Spanish, and it's not clear from the record that he
11 can read. It's not interpreted to him. You have seven
12 officers standing around. Are you going to consent to
13 search? All of your property is on the hood of the car
14 and it's not given back to you. You're just supposed to
15 understand somehow that you're allowed to get your stuff
16 and go from this scene where they're invading your house?

17 THE COURT: What do you make of the testimony that
18 he's been in the country for 17 years, and the community
19 in which he lives is not one where there are many folks
20 of Hispanic origin or Spanish speaking individuals, so
21 that he must be able to speak English in order to get
22 around? What do you make of that position?

23 MS. COLEMAN: I would argue that neither officer
24 testified that they are an expert in linguistics or in
25 census population of that area. I just don't think that

1 we can give it much credit. I think that, you know, I
2 could just as easily argue, you know, people get by
3 without speaking perfect English. People get by --
4 immigrants get by in our community and don't understand
5 everything that's communicating. But in something as
6 important as waiving your right to have your house
7 searched? I believe it's incumbent on the officers to
8 make sure that they know -- or make sure that this
9 defendant understands because, otherwise, the consent is
10 not voluntary. And that did not happen in this case.

11 And then as -- so all our argument is, again, he
12 is clearly detained. They can argue that, oh. He could
13 pick up his stuff and he could leave. He's got a car
14 there. He'd already been told he can't drive. His cell
15 phone, his wallet, everything is all in that car. He
16 would have to go up -- he's been escorted by Officer
17 Lewis. He would have to leave that officer and get all
18 his possessions.

19 And then something even more troubling, in regard
20 to whether or not he's detained, is that he -- the
21 officers testified that he's free to use his cell phone,
22 but he is not. The one time he tries to use the cell
23 phone to talk to the person who's closest to him in his
24 native language, he's not allowed to do that because the
25 police want to be able to listen in to his phone calls.

1 And I do think that it is not believable that he is free
2 to leave and not in custody when he's not allowed to call
3 his wife and speak his language to his wife without law
4 enforcement listening in to it.

5 THE COURT: To what extent can the information
6 about his previous alleged criminal activities and the
7 government investigation of this defendant come into play
8 here.

9 MS. COLEMAN: I think that -- basically, I think
10 the Court can consider it in the motivations of the
11 police officers. I mean, frankly, their motivation was
12 to get in that house, and they were going to do whatever
13 they could to get in that house. But if you look at the
14 evidence that was developed in the course of this
15 investigation they had zero evidence that there was going
16 to be drugs found at the house. At most, they had
17 evidence that there would be guns found in the house.
18 But our argument is that those statements should have
19 been suppressed and are a violation of Mr. Villa's
20 *Miranda* because he was already detained at the time he
21 told them that. And if they wanted to search his house
22 for firearms they should have gotten a warrant to get in
23 that house.

24 THE COURT: Would the previous -- I'm backing you
25 up chronologically, I know, and I'm sorry. Back to the

1 weapons frisk. Would the previous information that they
2 had obtained from surveillance of the defendant and that
3 investigation have been properly considered when they
4 were thinking about a weapons frisk, for example, at the
5 stop?

6 MS. COLEMAN: I don't think that any officer -- I
7 don't think there's any evidence in the record from the
8 testimony today that there was reliable information that
9 he was currently armed or currently dangerous. And there
10 was no testimony -- I think I specifically asked this
11 from the officers and whether they saw Mr. Villa exit
12 the house with weapons. No weapons were seen upon
13 approach to the vehicle. So I don't think there's
14 anything in the record to support that he could have been
15 patted down because he was armed and dangerous. I think
16 that we have, maybe in the pleadings, some second and
17 thirdhand talk about it. But you can even look in the
18 pleadings and there's nothing current in regard to
19 whether or not Mr. Villa was currently armed. I think
20 if they would have felt -- needed to have felt he was
21 dangerous in order to pat him down for firearms.

22 THE COURT: All right.

23 MS. COLEMAN: So, I think, in conclusion, Your
24 Honor, you know, our argument is that he didn't consent
25 to the search of his person and home. Whether consent is

1 voluntarily given, written consent is just one factor.
2 There are five factors under *Roberson* that's cited in our
3 motion to suppress and, of those factors, many weigh in
4 Mr. Villa's favor. The officers -- number of officers
5 present, the characteristics of the person searched, and,
6 again, he's a non-native, a Spanish speaker. He is not
7 necessarily fluent in our criminal justice system as far
8 as consent to search. And we have no idea about his
9 level of education. At no point was he ever advised he
10 had the right to decline any of this, and I think that
11 that is fair for the Court to consider also.

12 So I think, based on the totality of these
13 circumstances and the law as presented in our pleadings,
14 what you'll find is that this -- again, I can't repeat it
15 enough. This atmosphere is so dominated by law
16 enforcement that there is no way that Mr. Villa could
17 have given such a voluntary consent to come to his home
18 and to search it.

19 THE COURT: Let me ask you a couple of questions
20 before you conclude here. As I indicated with
21 Mr. Thorneloe, I see no evidence of video or audio
22 recordings. Do you agree with that?

23 MS. COLEMAN: We specifically requested those and
24 -- I think I asked at the preliminary hearing if those
25 were available, and I don't believe that they were

1 equipped with cameras.

2 THE COURT: And would you also agree that to the
3 extent there's a factual dispute, or factual disputes,
4 regarding the evidence in this case, that those would be
5 resolved by the Court based on the credibility of the
6 witnesses and the weight of the evidence?

7 MS. COLEMAN: That's correct, Your Honor.

8 THE COURT: Now with respect to the evidence
9 specifically for the Court to consider on this motion.
10 The defendant -- excuse me. The government has
11 introduced, without objection, what has been admitted
12 Government's Exhibit Number 1. There are additional
13 documents that have been attached to the pleadings.
14 What's the position of the defendant with respect to what
15 the Court could consider with respect to the evidence?

16 MS. COLEMAN: I think that their pleadings are
17 part of the record and, so, the Court can consider them.

18 THE COURT: What about exhibits to the pleadings?

19 MS. COLEMAN: I know that there is Trooper
20 Stewart's report -- sorry -- Task Force Officer Stewart,
21 Officer Breedlove's report, and the complaint, which is
22 also part of the record. I don't know if the government
23 has a position.

24 THE COURT: And perhaps -- if my memory is wrong
25 -- perhaps the defendant has included documents as well.

1 The Homeland Security report, for example?

2 MS. COLEMAN: Those are the documents we attached
3 to our pleadings.

4 THE COURT: Is there any objection to the Court
5 considering those as well?

6 MS. COLEMAN: No, Your Honor.

7 THE COURT: Okay. So any documents in the record
8 that have been submitted so far in the position of the
9 defendant? Or it's the position of the defendant that
10 the Court may consider the testimony today, Government's
11 Exhibit 1, as well as any documents that have been
12 submitted in the record today? Is that right?

13 MS. COLEMAN: Yes, Your Honor.

14 THE COURT: Okay. Thank you. Anything further
15 from the defendant?

16 MS. COLEMAN: No, Your Honor.

17 THE COURT: Thank you.

18 Mr. Thorneloe.

19 MR. THORNELOE: Thank you, Your Honor. Just let
20 me put out there what our standard is before with
21 custodial interrogation. It is that that action is
22 curtailed to a degree of formal arrest. If you want to
23 see some cases where we have that, take a look at *Hashime*
24 and, let's see, what else? *Colonna*. There you have 15
25 to 30 officers, 23 FBI agents, a three-hour interview,

1 defendants pulled out of bed at night nearly naked and
2 thrown out on their lawn. Their family is not allowed to
3 smoke a cigarette. Now there is a police dominated
4 environment. So that's what this defendant is comparing
5 these officers to. The evidence doesn't really bare that
6 out, that that's what these officers are like. Instead,
7 let's rook at some of the factors that relate to
8 custodial interrogation.

9 The duration of *Colonna* and *Hashime*, as I said,
10 three-hour interviews. How long is our interview,
11 really, here of the defendant on the roadside,
12 "Conversation 1?" Maybe 15 minutes. We've got to go
13 back and forth. The form is signed at the house by 7:29
14 p.m. So that conversation necessarily was pretty short.
15 And how many questions were asked during that period of
16 time? Investigative type questions. Not many. Three or
17 four at that point.

18 The number of officers is maybe a little bit more
19 than normal for a traffic stop, yes, that's true. But
20 what effect did those officers really have on the
21 defendant in this case? Not much at that traffic stop.
22 The show of force; the display of weapons. Detective
23 Stewart testified, who is the one who talked to the
24 defendant, you -- you couldn't tell he was a cop. He was
25 dressed in plainclothes. He had his fishing shirt on, or

1 absent plainclothes and no weapon showing. No, you have
2 officers never showing a weapon. No officer ever gave
3 any forceful commands. There was nothing like that.

4 What about statements concerning custody? None
5 were ever made. The only statement concerning custody
6 was that you are not under arrest. Restrictions on his
7 freedom of movement? A little bit, particularly during
8 the search of the vehicle. The officer said, hey. Stand
9 back here with me. It was a short period of time of
10 approximately ten minutes.

11 Officer tone and demeanor. I doubt you will ever
12 get a case in here where the officers' tone and demeanor
13 are better than they are in this case. These officers
14 are absolutely cool with this defendant. He cannot
15 complain one bit about how they were acting or treating
16 him.

17 What about accusations of criminal conduct?
18 Nearly none. We have an accusation of concerning traffic
19 offenses and use of marijuana. The issue did not come up
20 at all. They never mentioned drug trafficking. The
21 defendant should not have felt, or reasonably felt, as if
22 he had been accused of a large drug conspiracy or large
23 drug trafficking.

24 Your Honor, with respect to the invitation. It is
25 our position that there was an invitation. This officer,

1 whose testimony came through very loud and clear, was
2 that the defendant brought that up for the first time.
3 Contrary to that, you have an affidavit that is
4 self-serving and has not been subject to cross-
5 examination.

6 The weight of the evidence is clearly in the
7 government's favor with respect to the invitation. And
8 our characterization of the evidence is that, followed by
9 the invitation, there was an opportunity given by the
10 defendant to change his mind. Not a "begrudging
11 submission" type statement that case law has, but another
12 chance to decide that he didn't really want to do that.
13 And then that was followed by the written consent form
14 which the case law says is a factor in the government's
15 favor.

16 And the defendant says, well, he doesn't really
17 understand English. There is nothing about that. You've
18 got the defendant, again, in his affidavit, and we have
19 two other officers who said he had no problems. He told
20 us he's been here for 17 years, he runs a business here,
21 he lives here. We talked to him and he never asked for
22 an interpreter. He never said he didn't understand what
23 was going on.

24 So, on the whole, you have to ask is was it
25 voluntary consent? And I say it was. You've got a lot

1 of strong factors in favor. You don't have seven
2 officers hovering over him about consent. You really
3 have one officer that talked to him about that.

4 Your Honor, finally, I'll leave you with this.
5 These issues don't necessarily get decided together.
6 They all go to the totality of the circumstances of the
7 issue. Whether there was voluntary consent given on that
8 search form, you need to analyze that separately would be
9 our position. And there could be a situation where an
10 individual was found to be in custodial interrogation and
11 consent was still voluntary. Those are not necessarily
12 the exact same questions.

13 THE COURT: Even though he was not mirandized.

14 MR. THORNELOE: Right. *Miranda* is a different
15 area of the law, and the "fruit of the poisonous tree"
16 issue with respect to searches and custodial
17 interrogations are a little bit different areas of case
18 law. I think you will find some case law that says they
19 don't necessarily have to be decided together. That
20 said, Your Honor, our position is you should analyze this
21 position separately. There's a factual dispute as to the
22 voluntariness of the consent, perhaps, but I don't think
23 the search of his person at the scene, at the traffic
24 scene, is particularly important.

25 Let's say you say anything you found at that

1 search is thrown out. Okay. So what? You don't have a
2 marijuana vape pen and \$3,000. That's not what he's
3 charged with possessing illegally. I say it was still
4 okay. Your Honor, we do have the North Carolina case law
5 that says when there is probable cause of the odor of
6 marijuana you can search a person. And who did that
7 search? A North Carolina officer who was following his
8 own case law. So I think that that is okay.

9 Your Honor, I think, on the whole, we have
10 officers who behaved themselves exceedingly well and that
11 their communities should be proud of, who are working
12 hard to interact with the public in a way that finds
13 criminal conduct, that isn't an onerous police conduct.
14 If you want to see examples of onerous police conduct
15 look to the cases that they say this is like. This isn't
16 like those cases. So we ask Your Honor that you not
17 suppress this evidence.

18 THE COURT: Let me ask you this question about the
19 jurisdictional issue that the defendant has raised. Do
20 you want to make any argument about that?

21 MR. THORNELOE: Your Honor, of course. That
22 issue wasn't raised until today as far as I'm aware. I
23 don't think it's in a pleading from the defendant. If it
24 is, I apologize. We didn't come here prepared to point
25 to dots on a map or something like that. As far as I

1 know, that doesn't provide the defendant with any
2 particular constitutional right that would overturn any
3 of this evidence.

4 At most, you have county detectives who are -- if
5 you believe everything the defendant says -- just over
6 the side of the county where the traffic offenses
7 occurred and in the other county driving without a
8 license, and he was followed into the other county if you
9 find that he was in the other county there. I don't see
10 any case law, or any line of authority, that says that
11 even if they're right that that somehow compels the
12 suppression of the settings. That would be our position,
13 Your Honor.

14 THE COURT: All right. Let me do this. Are there
15 any issues -- well before I leave that topic, let me ask
16 you one other thing. With respect to the exhibits in the
17 record. Does the government have any objection to the
18 Court considering those?

19 MR. THORNELOE: No, Your Honor. I hadn't really
20 given it much thought. I think it's a little unusual to
21 have an affidavit, but maybe it's only unusual to me I
22 don't know. But I think what I would say about the
23 affidavit is what I've already said, which is that it's
24 entitled to less weight because the defendant did not
25 take the stand and he was not subject to cross-

1 examination.

2 THE COURT: I'm thinking about the other materials
3 as well that have been included.

4 MR. THORNELOE: Yes, Your Honor. Well, you know,
5 a lot of those are our reports of investigation, Your
6 Honor, so I'm not going to stand here and say you
7 shouldn't consider those. There are things in discovery,
8 and things that are written about this case, that if the
9 defendant is comfortable with that then we're comfortable
10 with that too.

11 THE COURT: Okay. All right. Are there any
12 issues that either party thinks would benefit from
13 supplemental briefing here? I'm thinking about the
14 jurisdictional issue, frankly, but there may be others.
15 Now, having heard the testimony here, what do you say
16 about that, Mr. Thorneloe?

17 MR. THORNELOE: Your Honor, I think with respect
18 to consent to search, and custodial interrogation, the
19 pleadings gave you the tests. You've heard the major
20 case law. We could always spend a little bit more time
21 finding one more case. I don't know that that really is
22 a reason to do an initial briefing.

23 With respect to the jurisdictional issue. I don't
24 know what particular argument she's putting forth with
25 respect to being in the other county. As far as I know,

1 the defendant hasn't come out and said therefore suppress
2 all the evidence because we found you were in Jackson
3 County -- or Cherokee. I'm sorry. So if the Court were
4 to go in any direction whatsoever with that issue I think
5 there would need to be additional briefing.

6 THE COURT: Ms. Coleman, what's your position on
7 that?

8 MS. COLEMAN: I agree. The jurisdictional issue
9 didn't come in until we actually drove it and we realized
10 the actual stop, we believe, was in Cherokee County. So
11 I haven't had a chance -- had the opportunity to do a
12 deep dive into the issue. But I do think it would matter
13 in regard to whether officers had no right to stop him to
14 begin with, and everything they found from that point
15 forward would arguably be invalid.

16 As to the other issues. I think that they are
17 pretty well briefed in our motion to suppress and our
18 reply. I think all the case law is there. As
19 Mr. Thorneloe says, we can probably find one more case.
20 I think that they all applied to the evidence as it is,
21 but I'm happy, if the Court would like, to take an issue
22 and look at the jurisdictional issue.

23 THE COURT: Why don't we do this? Let me give you
24 -- is a week enough time? I'm thinking about a short
25 supplemental brief of five pages.

1 MS. COLEMAN: that should be fine, Your Honor.

2 THE COURT: So why don't we set a deadline of one
3 week for the defendant to file a supplemental brief on
4 that issue? That's that t new issue that's been raised
5 today regarding the jurisdiction of the officers making
6 the stop.

7 Mr. Thorneloe, would you-all like a week to
8 respond to that?

9 MR. THORNELOE: I think that would be fine, Your
10 Honor.

11 THE COURT: Okay. And then the government will
12 have one week to respond. I'm not inclined to take any
13 replies, if that's okay.

14 MS. COLEMAN: That's fine, Your Honor.

15 THE COURT: You-all can just do it. Do it well
16 the first time, and I'm sure you will.

17 All right. Are there any other issues we need to
18 take up for today?

19 MR. THORNELOE: Not from the government, Your
20 Honor.

21 THE COURT: How about from the defendant?

22 MS. COLEMAN: No, Your Honor, thank you.

23 THE COURT: Well let me just say thank you to
24 Mr. Thorneloe and Ms. Coleman for your fine advocacy
25 today and briefs as well. I have reviewed the documents

1 closely, and I will continue to review them closely. I
2 look forward to seeing the additional materials. And we
3 will -- I'll take the matter under advisement, and I'll
4 issue a memorandum and recommendation in due course.
5 Thank you-all very much.

6 MR. THORNELOE: Thank you, Your Honor.

7 MS. COLEMAN: Thank you.

8 THE COURT: That will conclude all matters in this
9 case for today.

10 Thank you.

11 (Off the record at 2:05 p.m.)

12 **CERTIFICATE**

13 I, Tracy Rae Dunlap, RMR, CRR, an Official Court
14 Reporter for the United States District Court for the
15 Western District of North Carolina, do hereby certify
16 that I transcribed, by machine shorthand, from the
17 court's audio recording system, the proceedings had in
the case of UNITED STATES OF AMERICA versus FRANCISCO
ESCAMILLA VILLA, Criminal Action Number 1:18-CR-86, on
December 4, 2018.

18 In witness whereof, I have hereto subscribed my
19 name, this 14th day of December, 2018.

20 __/S/__Tracy Rae Dunlap__
21 TRACY RAE DUNLAP, RMR, CRR
22 OFFICIAL COURT REPORTER
23
24
25